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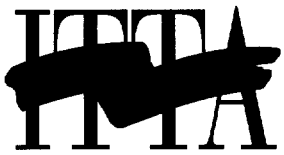

INDEPENDENT
TELEPHONE & TELECOMMUNICATIONS
ALLIANCE

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 29, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Portals Building
445 12th Street, S.W., TW-B204
Washington, D.C. 20554

Re: In the Matter of Telephone Number Portability, Cost Classification Proceeding, CC Docket No. 95-116, RM-8535

Dear Ms. Salas:

This letter is to advise you that the Independent Telephone and Telecommunications Alliance (ITTA) is submitting the attached Comments in the above-referenced proceeding. One original and nine copies of the Comments are attached for filing with your office in accordance with the Commission's rules. An additional copy is also attached for filing with the International Transcription Services (ITS).

Please contact me if you have any questions regarding this matter.

Respectfully submitted,

David W. Zesiger
Executive Director

Enclosures

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List ABCDE

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Telephone Number Portability	)	CC Docket No. 95-116
Cost Classification Proceeding	)	RM-8535

COMMENTS OF THE INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

Cincinnati Bell Telephone Company (CBT) has applied to the Commission for a review of and to vacate the December 14, 1998 Memorandum Opinion and Order of the Common Carrier Bureau, DA 98-2534 (the Order) concerning recovery of costs associated with local number portability (LNP). CBT argues that the Bureau unlawfully exercised its delegated authority in a manner effecting a substantive change in Commission cost recovery rules and effectively forestalling incumbent local exchange carrier recovery of costs incurred pursuant to Commission mandate. On behalf of its midsize company members (of whom CBT is one), the Independent Telephone & Telecommunications Alliance herewith files comments in support of CBT's Application for Review and urges Commission review and revocation of the Order. ITTA believes this course is warranted by the following considerations.

1. Requiring ILECs to absorb the cost of LNP violates the Commission's own principles of competitive neutrality.

ITTA has previously drawn the Commission's attention to the disproportionate burden which new regulatory mandates issued by the Commission impose on midsize companies. In its current Forbearance Petition,[1] ITTA observed:

> "One-size-fits-all" regulation typically results in substantially greater compliance burdens on mid-size companies than on larger ILECs. This is particularly true when costs are measured on a per-line or per-customer basis, yielding mid-size company compliance costs that can easily total many multiples of the largest companies.[2]

Competition in price is a primary goal of implementing competitive policies in the telecommunications industry. Reductions in price are a primary source of consumer benefit. In the case of LNP, this focus on pricing impacts caused the Commission to refrain from adhering to its usual cost-causation standards under which the purchaser of a service pays at least the incremental cost of providing that service. As the Commission found:

> Pricing number portability on a cost-causative basis could defeat this purpose because the nature of the costs involved with some number portability solutions might make it economically infeasible for some carriers to compete for a customer served by another carrier.[3]

But all cost burdens can affect price, hence competitive position in the marketplace. (Since services invariably are sold on a per customer basis, the disproportionate burden borne by midsize companies, above, is especially relevant.) In assigning LNP costs to carriers, the Commission expressly proclaimed that it would do so in a manner which would not interfere with principles of competitive neutrality:

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[1] "Petition for Forbearance of the Independent Telephone & Telecommunications Alliance," AAD 98-43 filed February 17, 1998; consideration period extended to May 18, 1999 (Order of January 20, 1999, ASD 98-43, DA 99-197).
[2] Id. at i.
[3] *In the Matter of Telephone Number Portability*, Third Report and Order, CC Docket No. 95-116 (released May 12, 1998) at para. 41 (LNP Order).

> We adopt the Commission's tentative conclusion to apply to long-term number portability the Order's definition of competitive neutrality as requiring that "the cost of number portability borne by each carrier does not affect significantly any carrier's ability to compete with other carriers for customers in the marketplace."[4]

The Order of the Bureau does not meet the broad principle inherent in this Commission determination. Forcing midsize companies such as CBT to absorb major costs clearly associated with LNP under the Bureau's two-part test directly and adversely impacts the prices such companies must charge for other interstate services. Economics of scale will dictate that these charges have "per customer" or "per line" consequences on midsize carriers greater than for the larger ILECs. Smaller competitors' costs should also be lower given their ability to integrate these functionalities as they build out their networks. Forcing midsize carriers to provide competitors large or small with LNP, but to bear disproportionately more of the costs therefor, is inconsistent with the mandate of Congress that:

> The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.[5]

The Order's proposed cost recognition scheme fails to meet this standard, is not in fact competitively neutral, and should be vacated.

As a separate but related matter, ITTA concurs in CBT's argument that the Commission lacks power to tacitly pass these costs on to the states via intrastate rates (as by forcing recovery of LNP costs through state charges). In addition to the legal grounds cited by CBT, ITTA notes that the allocation of costs between state and interstate

[4] Id. at para. 52
[5] 47 U.S.C. 251(e)(2).

jurisdictions is a matter of constitutional dimension.[6] Section 410(c)[7] of the statute sets out the primary vehicle for adjusting such allocations, and the process of jurisdictional separations is already an active, continuing one.[8] In the matter of LNP, as in other matters reflecting Commission imposition of new regulatory burdens, an attempt to wish legitimately incurred costs "into the cornfield" of intrastate rates will simply not work. Federal policies must address and bear their own costs rather than trying to impose them on other jurisdictions.

2. Requiring ILECs to absorb the cost of LNP violates their Constitutional right to a reasonable opportunity to earn a reasonable return on their investments.

In its LNP Order, the Commission acknowledged the obvious fact that implementation of local number portability would require ILECs to make investments and incur costs. [9] The same LNP Order makes clear that these costs are incurred as a result of governmental direction, both statutory and regulatory. Under such circumstances, the courts have long recognized that entities devoting their investments to such public purposes must be afforded a reasonable opportunity to recover their costs and investment and to earn a reasonable return on the latter.

> The thing devoted by the investor to the public use is not specific property, tangible and intangible, but capital embarked in the enterprise. Upon the capital so invested the federal Constitution guarantees to the utility the opportunity to earn a fair return.. . . The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost

[6] *Smith v. Illinois Bell*, 282 U.S. 133 (1930).
[7] 47 U.S.C. 410(c).
[8] See *In the Matter of Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, Notice of Proposed Rulemaking (released October 7, 1997).
[9] LNP Order at para. 4:

> Although telecommunications carriers, both incumbents and new entrants, must incur costs to implement number portability, the long-term benefits that will follow as number portability gives consumers more competitive options outweighs these costs.

> includes not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest, for the use of the capital, whatever the nature of the security issues therefor; the allowance for risk incurred; and enough more to attract capital. The reasonable rate to be prescribed by a commission may allow an efficiently managed utility much more. But a rate is constitutionally compensatory, if it allows to the utility the opportunity to earn the cost of service as defined....[10]

This well-established principle provides the appropriate context for deriving the congressional meaning conveyed in section 251(e)(2).[11] More importantly, it prevents the Bureau from imposing the course for recovery set out in its Order. Midsize ILECs continue to be regulated as dominant carriers by the Commission. Indeed, LNP is a specific statutory and Commission-mandated activity, actively supervised by the Commission. Midsize companies are thus devoting their LNP investment to a public use, precisely because "the long-term benefits that will follow as number portability gives consumers more competitive options outweighs these costs."[12]

In devoting their capital to and incurring costs associated with LNP, midsize companies are engaging in regulated activities falling squarely within the protections established by the Supreme Court as a matter of Constitutional law. The Order denies direct recovery of the costs identified in the CBT Application. The indirect recovery, alluded to

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[10] *Missouri ex rel. Southwestern Bell Telephone Co. v. Missouri P.S.C.*, 262 U.S. 276 (!932 (quote from Brandeis, J., dissent.) The cited principle was less eloquently upheld by the Court in *Bluefield Water Works & Improvement Company v. P.S.C. of West Virginia*, 262 U.S. 679 (1923):

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.

See also *Federal Power Commission v. Hope Natural Gas*, 320 U.S. 591 (1944); *Duquesne Light Co. v. Barasch*, 48 U.S. 299 (1989).

[11] In ITTA's view, Congress presumed all carriers would have the right to recover LNP costs; the allocation of such costs (for recovery) was merely to be competitively neutral. As argued above, this requirement undermines, rather than supports, the imposition of the bulk of all costs on ILECs, and then forcing recovery through price increases in markets exposed to competition.

but not provided for in the Order, is illusory. Just as universal service support costs cannot be recovered through add-ons to rates subjected to competitive pressure, neither can LNP costs be recovered as add-ons labelled "the cost of doing business." In failing to allow for direct recovery of these costs, the Order consigns these costs to effective unrecoverability. The Order in question clearly does not afford midsize companies a reasonable opportunity to recover their costs or to earn on their investment. It is therefore legally deficient.

Conclusion

The Commission should carefully consider both the legal precedents and the policy implications of the proposed Bureau Order. In selecting among methodologies for effectuating the 1996 Act, the Commission should be giving more attention to the comparative costs generated by each methodology. Cost-benefit analysis and cost discipline should be a regulatory as well as a business precept. The Bureau's approach of attempting to ignore or to define away such costs obscures rather than solves the problem and should be disapproved.

Respectfully submitted,

INDEPENDENT TELEPHONE &
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By: _____
David W. Zesiger, Executive Director

By: _____
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January 28, 1999

[12] See n.9, supra.